No. 18-11388-G

In the United States Court of Appeals for the Eleventh Circuit

JAMES MICHAEL HAND, *et al.*,
Plaintiffs/Appellees,

v.

RICK SCOTT, *et al.*,
Defendants/Appellants.

DEFENDANTS/APPELLANTS' SUPPLEMENTAL BRIEF

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
NO. 4:17-CV-128-MW-CAS

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1, Defendants/Appellants submit the following certificate of interested persons:

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19. Fugett, David Andrews, *Attorney for Defendant/Appellant Ken Detzner*

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39. Schlackman, Mark R., *Amicus Curiae*

40. Smith, Christopher Michael, *Plaintiff/Appellee*

41. Walker, Hon. Mark E., *U.S. District Judge*

42. Wenger, Edward M., *Attorney for Defendants/Appellants*

43. Wyant, David A., *Defendant/Appellant*

SUPPLEMENTAL BRIEF

I. Question (1): Whether any of the plaintiffs in this case, as a result of their prior felony convictions, will continue to be disqualified from voting after the recently adopted amendment to Article VI, Section 4 of Florida's constitution goes into effect.

As of the filing date for this brief, it appears that two Plaintiffs will remain disqualified from voting after the recently adopted Amendment goes into effect. Current records reveal that these two Plaintiffs have yet to pay certain court costs and fees associated with their convictions.

As best as Defendants have been able to determine, the other Plaintiffs' disqualifications likely will end after the Amendment goes into effect. However, those Plaintiffs may be aware of facts that would change their eligibility for restoration under the Amendment. In any event, the Plaintiffs' eligibility could end at any time before the Amendment takes effect if they incur another felony conviction.

A. The amendment ("Amendment 4") takes effect on January 8, 2019. *See* Art. XI, § 5(e), Fla. Const. Amendment 4 adds the following underlined text to Article VI, section 4:

> (a) No person convicted of a felony, or adjudicated in this or any other state to be mentally incompetent, shall be qualified to vote or hold office until restoration of civil rights or removal of disability. Except as provided in subsection (b) of this section, any disqualification from voting arising from a felony conviction shall terminate and voting rights shall be restored upon completion of all terms of sentence including parole or probation.
>
> (b) No person convicted of murder or a felony sexual offense shall be qualified to vote until restoration of civil rights.

See Constitutional Amendment Petition Form, Amendment 4, Department of State, https://dos.elections.myflorida.com/initiatives/fulltext/pdf/64388-1.pdf (last visited Dec. 4, 2018).

B. Previously, each of the Plaintiffs in this case was disqualified from voting because they were convicted of felonies. Under the currently operative constitutional text, that disqualification remains "until restoration of civil rights." Art. VI, § 4, Fla. Const. After January 8, 2019, the disqualification of those convicted of felonies other than murder or certain felony sexual offenses, and who have completed "all terms of sentence," "shall terminate and [their] voting rights shall be restored." *See* Constitutional Amendment Petition Form, Amendment 4, Department of State, https://dos.elections.myflorida.com/initiatives/fulltext/pdf/64388-1.pdf (last visited Dec. 4, 2018).

In short, under the Amendment, on January 8, 2019, Plaintiffs will be eligible for termination of their disqualification unless they have been convicted of murder

or certain felony sexual offenses, or unless they have not completed all terms of their sentence. Any Plaintiff ineligible under Amendment 4 would have to seek termination of their disqualification through the existing clemency process. *See* Art. VI, § 4, Fla. Const.

C. As best as Defendants have been able to determine through the confidential case analyses (CCAs), none of the Plaintiffs had been convicted of murder or a felony sexual offense. *See* Exhibits M–T to Defs.' Mot. for Summ. J., ECF No. 108 (N.D. Fla. Nov. 14, 2017) (Plaintiffs' CCAs; filed under seal). And as best as Defendants have been able to ascertain, that remains true (although Plaintiffs should advise this Court whether any of their circumstances have changed).

Plaintiffs also have averred that all of them have completed their respective sentences. *See* First Amend. Compl., ECF No. 29 at 10–15, ¶¶ 18–26 (N.D. Fla. Apr. 27, 2017); Plaintiffs' Affidavits, Exhibits A–I to Defs' Mot. for Summ. J., ECF. No. 108 (N.D. Fla. Nov. 14, 2017). Defendants note, however, that to be eligible for termination of disqualification under Amendment 4, Plaintiffs must have completed "*all terms*" of their felony sentences, which terms would include not only probation, parole, and supervised release, but also satisfaction of any restitution, fines, and court costs. Although the Plaintiffs' affidavits address probation, parole, and supervised release, they generally do not specify whether Plaintiffs have paid all fines, fees, court costs, and restitution.

As part of the clemency investigation process, staff interview the applicants and notify them of any outstanding fines, fees, court costs, and restitution reported by the applicable clerks of court. Two of the Plaintiffs were found to have outstanding fees and costs at the time their CCAs were generated. *See* Ex. P to Defs. Mot. for Summ. J. at 2–3, ECF No. 108 (N.D. Fla. Nov. 14, 2017); Ex. R. to Defs. Mot. for Summ. J. at 2–3, ECF No. 108 (N.D. Fla. Nov. 14, 2017). The six others with CCAs were found to have no such outstanding obligations. Thus, unless the Plaintiffs advise the Court otherwise, as of January 8, 2019, it appears that at least six of the Plaintiffs will be eligible for restoration under Amendment 4, while at least two will not.[1] The only available restoration mechanism for any Plaintiff ineligible under the Amendment remains the existing clemency process.

Even if the Plaintiffs have completed all terms of their sentences, have not been convicted of another felony offense for which all terms of sentence have not been completed, and have not been convicted of murder or a disqualifying felony sexual offense, it is not possible now to definitively determine whether their disqualification will end when the Amendment takes effect; any intervening felony conviction would render them ineligible for restoration under the Amendment.

[1] Because one of the Plaintiffs has not yet applied for restoration of civil rights, *see* ECF No. 29 at 15 ¶ 26, there is no CCA for her, and Defendants lack knowledge whether she has any outstanding obligations.

II. Question (2): If none of the plaintiffs are disqualified from voting after the amendment goes into effect, whether this case is moot under current law. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167 (2000); *Cook v. Bennett*, 792 F.3d 1294 (11th Cir. 2015).

Assuming that all of the Plaintiffs are and will remain, eligible for termination of their disqualification and restoration of their voting rights after the Amendment goes into effect, this case will be moot because "it [will be] impossible for a court to grant any effectual relief whatever to the prevailing party." *Cook*, 792 F.3d at 1299. If Plaintiffs' disqualifications are terminated and they are restored the right to vote, Plaintiffs would no longer suffer the injury alleged in the complaint. Although Plaintiffs' complaint requested certain class-wide relief, the district court denied Plaintiffs' motion to certify a class, meaning that no class-wide relief may be granted. *See* First Amend. Compl., ECF No. 29, Prayer for Relief (N.D. Fla. Apr. 27, 2017); Order Denying Plaintiffs' Mot. for Class Cert., ECF No. 150 (N.D. Fla. Feb. 13, 2018). In short, Plaintiffs sought the restoration of their right to vote, and under the assumptions discussed above, they will receive that relief without any court order. No case or controversy would remain.

Assuming the voting rights of all Plaintiffs are restored when the Amendment takes effect, this appeal would not appear to fall within any exception to the mootness doctrine. For example, it does not involve Defendants' "voluntary cessation of a challenged practice." *Friends of the Earth*, 528 U.S. at 189. Instead,

this case involves a change to Florida's Constitution that provides for the restoration of voting rights for a particular class of felons independent of the existing clemency process operated according to Defendants' duly enacted rules being challenged by Plaintiffs. Thus, "subsequent events [have] made it absolutely clear that the" challenged practice—allowing the Board to determine, pursuant to its rules, whether Plaintiffs' civil rights should be restored—"could not reasonably be expected to recur." *Id.* (quoting *United States v. Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 203 (1968)).

* * *

If, after hearing from the Plaintiffs, this Court determines that this case will become moot on January 8, 2019, and if this Court declines to issue an opinion before that date, only the question of remedy will remain—and this Court's precedent is clear on that issue. "[W]here a case becomes moot after the district court enters judgment but before the appellate court has issued a decision, the appellate court *must* dismiss the appeal, *vacate the district court's judgment*, and remand with instructions to dismiss as moot." *Dow Jones & Co. v. Kaye*, 256 F.3d 1251, 1258 (11th Cir. 2001) (quoting *Bekier v. Bekier*, 248 F.3d 1051, 1056 (11th Cir. 2001) (emphases added)). "This practice clears the path for future relitigation of the issues between the parties and eliminates a judgment, review of which was prevented through happenstance." *De La Teja v. United States*, 321 F.3d 1357, 1364 (11th Cir.

2003) (internal quotation marks omitted). And it "is premised on the principle that a party who seeks review of the merits of an adverse ruling, but is frustrated by the vagaries of circumstance, ought not in fairness to be forced to acquiesce in the judgment." *Id.* (internal quotation marks omitted).

Although the Court must vacate the judgment for Plaintiffs, the Court need not disturb the district court's rejection of Plaintiffs' claim against the waiting periods in Count IV or their request to enjoin Florida's disqualification laws, *see* ECF No. 144 at 39, 42. Plaintiffs did not cross-appeal those rulings, and "[a]bsent a cross-appeal, an appellee . . . may not 'attack the decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary.'" *El Paso Nat. Gas Co. v. Neztsosie*, 526 U.S. 473, 479 (1999).[2] Vacating the rulings that Plaintiffs chose not to appeal could enlarge their rights and lessen Defendants' rights, just as if Plaintiffs had appealed those orders and obtained reversals. And because review of those rulings was not "prevented through happenstance,"

[2] *See also Jackson v. Humphrey*, 776 F.3d 1232, 1239 (11th Cir. 2015) ("[Plaintiff], however, did not cross-appeal and thus may not use the Corrections officials' appeal to increase her rights"); *Chouinard v. Chouinard*, 568 F.2d 430, 433 (5th Cir. 1978) ("[A]n appellee who wishes to secure alteration or modification of a judgment must cross appeal.").

Munsingwear, 340 U.S. at 40, but instead was prevented through Plaintiffs' decision not to appeal them, this Court need not disturb them under *Kaye*.

For all these reasons, if this appeal becomes moot, the appropriate disposition would be to vacate the district court's orders insofar as they granted judgment for Plaintiffs while leaving them intact insofar as they rejected Plaintiffs' claim against the waiting periods and attack on Florida's disqualification laws. *Kaye*, 256 F.3d at 1258; *see United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950); *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 25 (1994) (affirming principle that "mootness by happenstance provides sufficient reason to vacate").

CONCLUSION

Because, based on information presently available to the Defendants, it appears that two of the Plaintiffs will continue to be disqualified from voting after the Amendment goes into effect, this case likely will not become moot when the Amendment takes effect.

But if the Plaintiffs advise this Court of facts making clear that each of them will be eligible for restoration under the Amendment (and so long as no Plaintiff is before then convicted of a new disqualifying offense), this case likely will become moot when the Amendment takes effect. Under these circumstances (and assuming that this Court has not yet issued a decision by the Amendment's effective date), this Court should dismiss the appeal, vacate the district court's final orders and judgment

insofar as they granted judgment for Plaintiffs (leaving intact the judgment for Defendants on Count IV and the district court's rejection of Plaintiffs' attack against Florida's disqualification laws), ECF Nos. 144, 160, 161, and remand with instructions to dismiss the case as moot.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This document complies with the type-volume and word-count limits of Fed. R. App. P. 32(a)(7) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 1,939 words.

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/s/ Amit Agarwal

Amit Agarwal

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 6th day of December, 2018, a true copy of the foregoing brief was filed electronically with the Clerk of Court using the Court's CM/ECF system, which will send by e-mail a notice of docketing activity to the registered Attorney Filer listed on the attached electronic service list. I FURTHER CERTIFY that all counsel for parties appearing below have been served by U.S. Mail and by electronic mail to the mailing addresses and e-mail addresses listed on the attached U.S. mail and electronic service list. All parties appearing below have been served.

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